PP

v.

ZULKIPLI IBRAHIM

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL APPEAL NO: 41-26-2005-II]
25 APRIL 2006

CRIMINAL PROCEDURE: *Sentence - Theft - Plea of guilt - Sentenced to RM50 fine - Whether inadequate - Whether repugnant to public interest - Whether Magistrate applying wrong test - Penal Code, ss. 24, 379 - Criminal Procedure Code, s. 316(b)(ii)*

This was an appeal against the decision of the learned Magistrate imposing a miserly fine of RM50 in default seven days' imprisonment on each of the respondents for the offence of theft (of steel rods) under s. 379 Penal Code that they had been charged with and pleaded guilty to. Apparently the learned Magistrate, in opting for a light sentence, was influenced by the fact of the respondents' belief that they were only collecting discarded materials and also of the worth of the rods which was valued at RM50. It was also the learned Magistrate's view that a reasonable man, put in the position of the respondents, would have thought that the rusty, oxidized and tarnished steel rods were no longer in use. The Public Prosecutor however argued that the sentence was manifestly inadequate, did not reflect the rampancy and seriousness of the offence and was offensive to public interest. This aside, it was argued that the learned Magistrate had wrongly applied the reasonable man test to the facts before her.

Held (allowing the appeal):

(1) The court agrees with the learned DPP that the Magistrate had erred in applying the reasonable man test because it does not matter what a reasonable man thinks in respect of the condition of the steel rods. The fact remains that both the respondents had acted dishonestly by taking the steel rods without permission from the company, and pursuant to s. 24 of the Penal Code had caused wrongful gain to themselves and wrongful loss to the company. (para 11)

(2) The learned Magistrate has not given due consideration and weight to the prime consideration of public interest. Clearly, considering the scope of punishment provided for the offence, the learned Magistrate has been unduly influenced by the value of the stolen property and was also unduly sympathetic with the respondents. (para 12)

A **(3)** Taking all factors into consideration, the sentence is substituted with and enhanced to a fine of RM1,000 in default two months' imprisonment. (para 14)

[Order accordingly.]

B **Case(s) referred to:**
Abu Bakar Alif v. R [1953] 1 MLJ 19 ***(refd)***
PP v. Lee Yu Fah [1973] MLJ 179 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Kok Wai [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 HC ***(refd)***
C *PP v. Mohamed Nor & Ors [1985] 2 MLJ 200* ***(refd)***
PP v. Ravindra N Rethinam & Ors [1992] 4 CLJ 2043; [1992] 3 CLJ 426 (Rep) HC ***(refd)***
PP v. Wong Chak Heng [1985] 1 CLJ 375; [1985] 1 CLJ (Rep) 717 HC ***(refd)***
Tukiran Taib v. PP [1955] 1 LNS 66 ***(refd)***

D **Legislation referred to:**
Criminal Procedure Code, s. 316(b)
Federal Constitution, art. 13
Penal Code, ss. 24, 379

For the appellant - Musli Abdul Hamid; DPP
1st & 2nd respondents in person
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Reported by Rose Aziz

JUDGMENT

F **Lau Bee Lan J:**

[1] The public prosecutor, the appellant, has appealed against the sentence imposed by the learned Magistrate. The learned Magistrate has sentenced the 1st and 2nd respondents, Zulkipli bin Ibrahim and Kamal bin Chek respectively to a fine of RM50 each and in default seven days' G imprisonment on their own plea of guilt.

[2] The 1st and 2nd respondent were charged with the following offence.

H > That you, jointly, on the 07th day of June 2005 at about 07.15 a.m., at a construction site, Ibraco Sdn. Bhd. at Tabuan Jaya Baru Kuching, in the State of Sarawak, committed theft of steel rods cut into various sizes valued at Ringgit Malaysia fifty (RM50/-) by dishonestly taking it out of the possession of one Ali Bin Enen (M) without his consent and you thereby committed an offence punishable under Section 379 of the Penal Code.
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[3] The prosecution has appealed against the inadequacy of sentence primarily on three (3) grounds:

(a) the sentence being manifestly inadequate;

(b) the sentence did not reflect the rampancy, gravity and seriousness of the offence;

(c) failure on the part of the learned Magistrate to strike a balance between public interest of the respondent.

[4] When asked by the court what the 1st respondent has to say in response to the submission of the learned DPP, the 1st respondent said he had asked the permission of the towkay of the construction site where he was working; and when he collected those rusty steel rods, it was in the presence of two security guards who told them they could collect the left over steel rods. The 2nd respondent also raised the same points. I drew to the attention of the 1st and 2nd respondents that this was contrary to the facts of the case, exh. A save for the fact that they were both employees of the company; and what they have informed the court would not be true otherwise it would have been noted by the learned Magistrate and in all probability they would have been asked to retract their plea of guilt. Apart from that they have nothing else to say.

[5] The court is mindful of the principles to be heeded by the court when exercising its appellate jurisdiction concerning sentence as has been elucidated by Abdul Hamid CJ (as he then was) (delivering judgment on behalf of the Supreme Court) in *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 at p 202 as follows:

> ... it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[6] Applying the ratio of the aforesaid case, in the light of the matters submitted by the learned DPP, I come to the following findings.

[7] The learned Magistrate stated that both the respondents had no intention of stealing the steel rods (exh. P1) which were approximately 30 kgs. in weight but they have done under the belief that the rods were not used. The learned Magistrate stated that she had viewed the steel rods personally and was of the opinion that any reasonable man would have thought the rusty, oxidized and tarnished steel rods were no longer in use.

[8] The learned DPP submitted that the learned Magistrate had wrongly applied the reasonable man test because in the eyes of non-business society the rusty, oxidized and tarnished steel rods (exh. P1) were no longer be in use but in the eyes of business society even a single cent is valuable; and the application of the reasonable man test is a denial of the right of property protected by art. 13 of the Federal Constitution.

[9] Although agreeing that it is an accepted practice that credit should be given to a plea of guilt, the learned DPP submitted that it is not a strict rule and *PP v. Ravindra N Rethinam & Ors* [1992] 4 CLJ 2043; [1992] 3 CLJ 426 (Rep) HC was cited. He further submitted that the learned Magistrate has erred or failed to take into consideration the following:

(i) that the discount given by the learned Magistrate was excessive as a guilty plea cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused and cited the case of *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 HC;

(ii) the paramount consideration of public interest and cited *Abu Bakar bin Alif v. R* [1953] 1 MLJ 19 in that criminal law is publicly enforced not only with the object of punishing the crime but also with the hope of preventing it;

(iii) the seriousness of the offence under s. 379 of the Penal Code as intended by the legislature in view of the punishment provided under the section,

(iv) the rampancy of the offence and the cases of *Tukiran bin Taib v. PP* [1955] 1 LNS 166 and *PP v. Wong Chak Heng* [1985] 1 CLJ 375; [1985] CLJ (Rep) 717 HC were cited;

(v) in passing sentence the learned Magistrate was over sympathetic with both the respondents and the case of *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 was cited.

[10] I note that the learned Magistrate in her grounds of judgment had taken into consideration the following:

(i) the guilty plea of both the respondents;

(ii) the fact that the offence was committed without "any deliberation, premeditation and any degree of criminality" on the part of both the respondents;

(iii) full restitution has been made to the company and the respondents had not enriched themselves; A

(iv) both respondents are first offenders;

(v) the respondents are daily paid construction workers and the financial circumstances of the respondents and the case of *PP v. Lee Yu Fah* [1973] MLJ 179 was cited in support; B

(vi) the value of the steel rods being RM50.

[11] As observed by the learned Magistrate based on the facts of this case, both the respondents admitted collecting the steel rods from the construction site of the company, Ibraco Sdn. Bhd. and they were under the apprehension that the steel rods were discarded materials. I agree with the learned DPP that the learned Magistrate had erred in applying the reasonable man test because it does not matter what a reasonable man thinks in respect of the condition of the steel rods. The fact remains that both the respondents had acted dishonestly by taking the steel rods without permission from the company and pursuant to s. 24 of the Penal Code had caused wrongful gain to themselves and wrongful loss to the company. This is especially so when one considers that both the respondents are employees of the company and would have the knowledge of whether the steel rods would be in use or otherwise. For this they have pleaded guilty and which the learned Magistrate has correctly considered it as a mitigating factor (I revert to this later). C D E

[12] I find that the learned Magistrate has taken into consideration all the necessary factors save for the following matter of which she has fallen into error and on the point of the reasonable man test which I have alluded to above. The learned Magistrate stated *"It must be clearly emphasized here that whilst public interest must necessarily be one of the prime considerations in sentencing, there are other important factors which a sentencer ought to consider in imposing particular sentence",* (see p 7 lines 23 to 33 of the Appeal Record). I am of the view that notwithstanding what has been stated by the learned Magistrate, she has in fact not given due consideration and weight to the prime consideration of public interest. The learned Magistrate has been unduly influenced by the value of the stolen property when one considers the fine of RM50 imposed *vis-a-vis* the punishment provided for an offence under s. 379 of the Penal Code being imprisonment for a term which may extend to seven years, or with fine, or with both, and for a second or subsequent offence shall be punished with imprisonment and also liable to fine or to whipping. I am in agreement with the learned DPP that the learned Magistrate has been unduly sympathetic with both the respondents. Here I would like to cite *Loo Choon Fatt's* case *(supra)* where Hashim Yeop A. Sani J opined at p 258 B to C: F G H I

A The correct approach is to strike a balance, as far as possible, between the interests of the public and interests of the accused. Lord Goddard L. C. J in *Rex v. Grondkowski* offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought or
B seems to be thought, that the interests of justice means only the interests of the prisoners.

[13] Upon enquiry from the court, the 1st respondent said that he was currently working as a labourer at Port Senari construction site earning RM35 per day and he was employed only about three weeks ago; the
C 2nd respondent stated that he is currently unemployed but was previously assisting his father in building houses in Kampong Simunjan.

[14] Taking all the factors and for the reasons given, I find that I am minded to interfere with the sentence imposed; otherwise a wrong
D message will be sent across indicating that an offence under s. 379 of the Penal Code is a trivial offence. Therefore, pursuant to s. 316(b)(ii) of the Criminal Procedure Code, I enhance the sentence in respect of the 1st and 2nd respondents by substituting the fine of RM50 with a fine of RM1,000 in default two months' imprisonment.

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